

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR DAVIS,

Defendant-Appellant.

UNPUBLISHED

September 23, 2008

No. 278318

Washtenaw Circuit Court

LC No. 06-001626-FH

Before: Schuette, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant was found guilty by a jury of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a), and was sentenced to five years' probation. He appeals as of right. We affirm.

Defendant claims there was insufficient evidence to support his conviction because the prosecution did not prove beyond a reasonable doubt that he touched the victim for a sexual purpose. We disagree.

I. FACTS

The fifteen-year-old victim lived with her mother in an apartment complex where defendant, a male in his forties, worked and resided. The victim and defendant became close friends over the course of several years. On the night in question, defendant and the victim watched a movie with the victim's mother and defendant's wife. When the movie ended, the victim's mother and defendant's wife left the apartment, but defendant and the victim stayed and watched another movie.

The victim testified that she was lying with her head on defendant's knee when, around three-quarters of the way through the movie, defendant placed his arm on her waist and then slowly moved his hand underneath her shirt and touched one of her bare breasts with his palm. On cross-examination, the victim acknowledged making a statement to the police that she thought the touching had been an accident. However, she also stated that she did not want to get defendant in trouble because of their friendship. The victim further testified at trial that she was not really sure it was an accident and she merely hoped that was the case.

Defendant denied intentionally touching the victim's breast and claimed that, because the victim was moving around a lot on the couch, it was possible he touched her breast while she was squirming but he was unaware he did so because his hand had fallen asleep.

The victim stated that several days after the incident defendant told her "he was sorry because he would never do anything like that." When asked whether he had apologized, defendant stated that he apologized for what the victim believed had happened.

II. STANDARD OF REVIEW

Whether the prosecutor presented sufficient evidence "entails review de novo." *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We "view the evidence in a light most favorable to the prosecution" to "determine whether any rational trier of fact could have found that the essential elements of the crime were proven [beyond a reasonable doubt]." *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

III. ANALYSIS

At issue is whether the prosecution produced sufficient evidence that defendant's touching of the victim's breast constituted "sexual contact," i.e., done for purposes of sexual arousal or gratification. MCL 750.520e(1)(a) and 750.520a(o). We hold that the evidence was sufficient to support defendant's conviction.

Intent may be "inferred from all the facts and circumstances." *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). "[Q]uestions of intent . . . involve weighing the evidence and assessing the credibility of witnesses, which is a task for the jury." *People v Cain*, 238 Mich App 95, 119; 605 NW2d 28 (1999). "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). The victim's testimony that defendant had his hand on her waist for several minutes then slowly moved his hand upward underneath her shirt and onto her breast was sufficient to allow a rational trier of fact to find that defendant acted intentionally. Although the victim initially stated she felt the touching had been an accident, her behavior immediately after the touching suggested otherwise. She left the couch under the pretext of having to use the bathroom and, when she returned, she sat at some distance away from defendant. The victim's mother noticed that the victim was not acting normal after the incident. She was distant, moody, sullen, "not her happy, bubbly self," and acknowledged the touching only hesitantly. Moreover, the victim testified at trial that, in her statement to the police, she meant that she had hoped defendant did not touch her intentionally. Even if the victim had testified that she believed it was an accident, the jury is the trier of fact and reaches its own conclusions of intent. *Cain, supra* at 119. Finally, defendant's apology to the victim after the incident could have been construed as a recognition of his guilt by a rational trier of fact. An appellate court "cannot weigh the evidence for [itself] and determine if [it] would have reached the same result as the jury did in [a] case." *Id.* Thus, the jury's determination that defendant acted intentionally should not be set aside.

While "proof of intentional touching, alone, is insufficient to establish guilt," the prosecutor need only show that the touching "could 'reasonably be construed as being for a sexual purpose.'" *People v Piper*, 223 Mich App 642, 647; 697 NW2d 494 (1997) (citation

omitted). It was reasonable for the jury to find that defendant's act of slowly moving his hand up underneath the victim's shirt and touching her bare breast with the palm of his hand was done for sexual gratification or arousal. That defendant did not fondle, squeeze, or massage the victim's breast does not establish that the touching was nonsexual in nature.

Affirmed.

/s/ Bill Schuette

/s/ Brian K. Zahra

/s/ Donald S. Owens